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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~307~~ 12

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,
Appellant (Defendant below),

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION,
Appellees (Plaintiffs below).

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MOTION OF APPELLEE MILWAUKEE ROAD COMMUTERS' ASSOCIATION TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT.

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Pursuant to Paragraph 1(c) of Rule 16 of the Rules of this Court, appellee, Milwaukee Road Commuters' Association, moves that the judgment of the District Court from which the appeal in this case was taken be affirmed on the ground that the questions raised by appellant are so insubstantial as not to need further argument.

STATEMENT OF THE CASE.

The Judgment Appealed From.

This is a direct appeal by Chicago, Milwaukee, St. Paul & Pacific Railroad (herein called "the Milwaukee Road"), from the judgment of a three-judge District Court entered on June 14, 1956. The judgment appealed from set aside and enjoined the enforcement of an order of the Interstate Commerce Commission authorizing and directing an increase in suburban passenger fares of the Milwaukee Road, and remanded the case to the Interstate Commission for further proceedings not inconsistent with the opinion of the District Court filed with its judgment.

The Suburban Passenger Lines Affected.

The suburban lines affected are the so-called "West Line" of the Milwaukee Road operating between Chicago and Elgin, Illinois, and the "North Line" operating between Chicago and Fox Lake, Illinois, with one suburban train operating in each direction beyond Fox Lake to and from Zenda and Walworth, Wisconsin.

The Proceeding Before the Interstate Commerce Commission.

The proceeding before the Interstate Commerce Commission in which the order set aside by the District Court was entered, was instituted by petition of the Milwaukee Road.

The petition (Ex. C to the Complaint) asked that the Interstate Commission conduct an investigation, under Section 13 of the Interstate Commerce Act, as to the effect

on interstate commerce of the intrastate suburban fares in the Chicago area as fixed by the Illinois Commerce Commission.

The petition alleged that the Milwaukee Road in October 1952 had filed an application with the Illinois Commerce Commission asking for authority to increase suburban fares over the fares theretofore approved by that Commission in November, 1951, and that the Illinois Commission had denied that application. The petition to the Interstate Commission alleges that the Illinois Commission conducted the hearings unfairly and that the denial of the application for an increase in fares resulted in an undue, unreasonable and unjust discrimination against interstate commerce.

The petition to the Interstate Commerce Commission asks:

1. That the Interstate Commission find that the "intrastate coach fares within the Chicago suburban area made or imposed by authority of the State of Illinois cause, and will continue to cause, disadvantage to and undue, unreasonable and unjust discrimination against interstate commerce" in violation of Sections 3(1) and 13(4) of the Interstate Commerce Act; and

2. That the intrastate coach fares be increased, and that "like increases" be made in the interstate suburban fares to Walworth and Zenda.

The interstate fares to the two Wisconsin villages are only incidentally involved and the request for an increase in those fares is conditioned on there being a like increase in the intervening intrastate fares.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION.

The Interstate Commerce Commission, although it found that the out-of-pocket loss of the Chicago suburban operation was less than half the amount claimed by the Milwaukee Road, entered an order (Appendices C, D, E to Appellant's Jurisdictional Statement) prescribing increased suburban fares estimated to yield additional revenue of $383,000 per year. The Interstate Commission found that this additional revenue would be sufficient to eliminate an out-of-pocket loss in the suburban passenger service of $306,000 (which includes as a so-called out-of-pocket expense, $258,172 of depreciation and maintenance-of-way expense allocated to the suburban zone) and to leave a balance of $77,000 to contribute to general overhead expense.

The Interstate Commerce Commission entered its order under Section 13(4) of the Interstate Commerce Act which gives the Commission power to fix intrastate fares where the fares fixed by state authority are found to have caused "undue, unreasonable, or unjust discrimination against interstate or foreign commerce."

The Interstate Commerce Commission based its order on the following ultimate findings and conclusions (Appendix C, Appellant's Jurisdictional Statement, pp. 36-7; also quoted in the District Court's opinion Appendix A to Appellant's Jurisdictional Statement, p. 17):

1. That the Milwaukee Road's present suburban fares result in an operating loss;

2. That the fares, as fixed by the Illinois Commerce Commission, will cause "undue, unreasonable and unjust discrimination against interstate commerce";

3. That the fares should therefore be increased to the level prescribed in the Interstate Commission's order; and

4. That the fares prescribed in the Interstate Commis-

sion's order are "just and reasonable", will produce "substantial additional revenue", and "are necessary so that travel thereunder may make a fair contribution" to the Milwaukee Road's "indirect costs and return on investment."

THE JUDGMENT OF THE UNITED STATES DISTRICT COURT.

The plaintiffs' action in the United States District Court to set aside the order of the Interstate Commerce Commission was based on the contention (which was sustained by the District Court) that the evidence before the Commission and the subsidiary findings in the Commission's order did not sustain the ultimate findings or conclusions upon which the order was based, and hence that the order could not stand.

The questions presented to the District Court mainly concerned the sufficiency of the factual basis of the Commission's order. The nature of the questions raised and the decision thereon, as stated in the opinion of the District Court (Appendix A to Appellant's Jurisdictional Statement, pp. 14-24), may be thus summarized:

1. While the Interstate Commission finds that the intrastate rates which it approves "would eliminate the out-of-pocket deficit and result in a contribution to the Milwaukee Road's indirect costs and taxes of approximately $77,000 annually and that those fares will produce substantial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment," there is no evidence or subsidiary finding to show what a "fair contribution" would be. As the District Court's opinion states (Appendix A to Appellant's Jurisdictional Statement, pp. 18-20):

> "* * * at no place does the commission make any findings as to what contribution from the intrastate

suburban traffic would constitute a fair proportion of the railroad's total income. In fact the interstate commission makes no finding as to what the Milwaukee Road's total income was for the year in question, and likewise no finding as to what would be a fair proportionate share of total income of the road which the intrastate traffic now under consideration should contribute.

* * * * *

"Nor is it sufficient that the interstate commission found that, to the extent that the suburban service fails to meet the out-of-pocket costs and make all the contribution that it reasonably can to respondent's indirect costs, it discriminates against its freight operations. This finding is no substitute for one as to what it should contribute as a fair proportionate share of the railroad's total income. Without the latter finding the order of the interstate commission cannot stand."

2. There is nothing in the report of the Interstate Commerce Commission that indicates the extent of the obligation of the suburban service to make a contribution to the indirect costs and taxes. As to this, the District Court's opinion states (Appendix A to Appellant's Jurisdictional Statement, pp. 20-21):

"We are here confronted with the imposition of an involuntary contribution being exacted by legal means. To be sustained, it must be based upon a finding of the extent of the obligation. It cannot be supported by a vague reference to an unascertained amount of 'indirect costs and taxes' or what the suburban service can reasonably contribute to the Milwaukee Road's 'indirect costs', or 'a fair contribution toward respondent's indirect costs and return on investment'."

3. There is no sufficient evidence to support the finding that the intrastate fares prescribed by the order are, or will be, just and reasonable for the future. As the Dis-

trict Court's opinion states (Appendix A to Appellant's Jurisdictional Statement, pp. 21-23):

> "This finding rests on an averment in the report that the comparison with the fares of the Chicago and North Western Railway Company is more persuasive, as, in the words of respondent's traffic witness, 'there is a strong similarity between the suburban territory served by the Milwaukee Road and that served by the North Western, * * *.'
>
> "The evidence of J. K. Pain, the traffic witness referred to [in the Interstate Commission's report] does not support this averment.
>
> * * * * *
>
> "There is no evidence offered showing similarity of equipment, service or operating conditions.
>
> * * * * *
>
> "Without sufficient evidence of comparability of operation, there is no ground for fixing the Milwaukee Road's fares at the North Western level, or for finding that the resulting fares are just and reasonable."

4. The authority of the Interstate Commission to nullify the action of a state commission (which has primary jurisdiction) in fixing or passing upon intrastate fares, arises when the evidence shows that the state commission's action on the evidence before it, was unjustly and unreasonably discriminatory against interstate commerce. That was not shown in this case. As the District Court's opinion states (Appendix A to Appellant's Jurisdictional Statement, pp. 23-24):

> "In the state commission proceeding, which was initiated by the Milwaukee Road, the latter showed in its exhibits that the depreciation of locomotives and coaches was not included in the out-of-pocket cost. Likewise, in its exhibits in that case it did not include in out-of-pocket expense certain maintenance of way accounts involving maintenance of facilities, such as roadbed, etc. The comments in the interstate commis-

sion's report, in regard to these items, show that they were by the Milwaukee Road deliberately removed from the consideration of the state commission. It follows that facts presented by Milwaukee Road to and relied upon by the interstate commission to support its finding as to an out-of-pocket suburban deficit, were not presented to nor relied on by the Milwaukee Road in the state commission proceeding. If different evidence is to be offered or a different basis of fares is to be urged before the interstate commission, the state commission should have been given a chance to fix fares on the same evidence and the same basis.

"In *North Carolina* v. *United States*, 325 U. S. 507, at 511, the court said: 'Since the enactment of Section 13(4), as before its enactment, a state's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate.'

"Where a railroad seeks the fixing of higher intrastate rates by the interstate commission after failing in such endeavor before a state commission, Section 13(4) does not contemplate that the state commission is to be considered only a way station in a journey to the interstate commission. In the instant case justification for the exercise of the federal power to nullify state rates does not clearly apear from the record before us."

The decree of the United States District Court, setting aside the order of the Interstate Commerce Commission and remanding the case for further proceedings was based upon the Court's decision on the questions presented as above described. That decision was arrived at after full examination by the Court of the record before the Interstate Commerce Commission.

The case does not involve any substantial question of law for decision of this Court.

ARGUMENT.

I.

WHERE THE DISTRICT COURT HAS REVIEWED THE RECORD AND FOUND THE EVIDENCE AND SUBORDINATE FINDINGS INSUFFICIENT, AND HAS APPLIED ESTABLISHED PRINCIPLES OF LAW AS A BASIS FOR ITS DECISION, THERE IS NO QUESTION OF SUBSTANCE FOR ARGUMENT IN THIS COURT, AND MOTION TO AFFIRM SHOULD BE GRANTED.

The District Court's opinion, as shown in the foregoing statement of the case, rests on the conclusion that there is insufficient evidence, and an absence of subsidiary findings, necessary to support the ultimate findings or conclusions upon which the order of the Interstate Commerce Commission rests.

The question as to whether or not there is sufficient evidence to sustain the findings of an administrative agency is one primarily for the Court (in this case, the three-judge District Court) which reviews the decision of that agency.

As said by this Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474 (490-491):

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. [In this case, the three-judge District Court.] *This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.*"*

* Note: Italics are ours, here and elsewhere, unless otherwise stated.

It was presumably this rule which led this Court to grant a motion to affirm in *Mississippi Public Service Comm.* v. *United States*, 124 F. Supp. 809, aff'd 349 U. S. 908, another recent case in which an order of the Interstate Commerce Commission was held to be unsupported by sufficient evidence and findings to justify overriding state fixed rates.

A brief review of the decision of the District Court in the present case will show:

1. That there is no colorable basis for a contention that that Court "misapprehended or grossly misapplied" the standards by which the weight and sufficiency of the evidence and the correctness of the conclusions drawn therefrom are measured;

2. That the principles of law applied by the District Court are well established by prior decisions of this Court and are not open to serious controversy; and

3. That there are thus no questions of substance involved in this appeal that would justify further argument and review of the record by this Court, and under Paragraph 1(c) of Rule 16 the motion to affirm should be granted.

II.

AN EXAMINATION OF THE POINTS UPON WHICH THE DISTRICT COURT RESTED ITS DECISION SHOWS THAT THAT DECISION WAS NOT BASED ON ANY "MISAPPREHENSION OR GROSS MISAPPLICATION" OF STANDARDS AS TO WEIGHT OR SUFFICIENCY OF THE EVIDENCE, AND THAT THE PRINCIPLES OF LAW APPLIED ARE WELL ESTABLISHED AND CALL FOR NO FURTHER ARGUMENT IN THIS COURT.

The points considered by the District Court, in arriving at its decision, and the grounds upon which those points were decided, are summarized above in our Statement of the Case (pp. 5-8, *ante*).

In general, they are:

A. (Dist. Ct. Opinion, Points 1 and 2.) That the ultimate finding or conclusion of the Interstate Commerce Commission that the increased suburban fares prescribed in its order would result in a "fair contribution" by the intrastate suburban service to the Milwaukee Road's indirect costs and taxes could not stand:

(1) Because of the absence of any finding (or, in fact, of any evidence) from which it could be determined what the amount of a fair contribution would be; and

(2) Because of the absence of any finding or showing as to the extent of the obligation (if any) of the intrastate suburban service to contribute to indirect costs and taxes.

B. (Dist. Ct. Opinion, Point 3.) The finding of the Interstate Commerce Commission that the increased suburban fares prescribed in its order are "just and reasonable," is a necessary finding, but cannot stand in this case because there is no sufficient evidence to support it.

C. (Dist. Ct. Opinion, Point 4.) The effect of the Interstate Commerce Commission's order was to nullify a prior order of the Illinois Commerce Commission refusing to increase the Milwaukee Road's suburban fares, which order was correct on the evidence presented to the Illinois Commission. The order of the Interstate Commerce Commission was predicated on different evidence, which had been deliberately withheld from the Illinois Commission. Under those circumstances, justification for the exercise of federal power to nullify the state rate did not appear with requisite certainty, and the order of the Interstate Commission entered in the attempted exercise of that power cannot be sustained.

A.

The Decision of the District Court That the Order of the Interstate Commerce Commission Cannot Stand Because of the Absence of Any Findings Showing What Would Constitute a Fair Contribution by the Intrastate Suburban Service to Indirect Costs Is in Accord With Established Principles of Law and Calls for No Further Argument Before This Court.

One of the grounds of the Interstate Commission's order prescribing increased suburban fares was that the intrastate suburban service would be thereby enabled to make "a fair contribution" to indirect costs and a return on investment (Appellant's Juris. Statement, pp. 34, 36).

But as the District Court points out (see quotation from Opinion, pp. 5, 6, *ante*) the order of the Interstate Commission makes no supporting finding and sets forth no data from which it could be determined what (if anything) would constitute a fair proportionate contribution by the intrastate passenger service to indirect or other operating costs.

As stated by the District Court (Appellant's Juris. Statement, p. 18) under the decisions of the Supreme Court, such supporting finding or findings are required to sustain the order.

Thus in *North Carolina* v. *United States*, 325 U. S. 507, (516) (quoted in the District Court's opinion), the Court said:

> "But the question posed by the Commission's conclusion was whether the particular North Carolina railroads were obtaining from North Carolina's intrastate passenger rates their fair part of such funds as were required to enable these particular railroads to render adequate and efficient service. The Commission

made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income."

And, as also pointed out in the District Court's opinion, the decision in *King* v. *United States*, 344 U. S. 254 (275), in no degree modifies the rule as laid down in the *North Carolina* case. In the *King* case, there was an express finding as to the relationship between the revenue produced by intrastate rates and the railroad's total income—a finding that is wholly missing in the instant case.

The decision of the District Court on this point is in line with the principles of law laid down by this Court and no further argument thereon is called for.

B.

PROOF THAT THE FARES PRESCRIBED BY THE INTERSTATE COMMERCE COMMISSION ARE JUST AND REASONABLE IS ESSENTIAL TO THE VALIDITY OF THE ORDER; WHEN THE DISTRICT COURT FOUND THAT THE COMMISSION'S FINDING TO THAT EFFECT COULD NOT BE SUSTAINED BY THE EVIDENCE, THE DISTRICT COURT PROPERLY HELD THAT THE ORDER WAS THEREBY RENDERED INVALID.

In this case, the order of the Interstate Commerce Commission duly found that the "prescribed fares will be just and reasonable for the future" (Appellant's Juris. Stmt. p. 36, Finding 4). That finding, as well as the existence of sufficient evidence to sustain it, was necessary to the validity of the order.

As said in *Georgia Commission* v. *United States*, 283 U. S. 765 (770):

> "It is true that when state rates are assailed on the ground that they result in undue prejudice to interstate shippers or discriminate against interstate com-

> merce, the Commission must determine whether the existing rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level."

The question in the instant case was whether the evidence supported that finding. The District Court held, after a full review of the record, that the evidence did not support the finding, and hence that for that reason (as well as for the others stated) the order was invalid (Appellant's Juris. Stmt. pp. 21-3; quotation from opinion, p. 7, *ante*).

As pointed out by the Court, the finding that the prescribed rules were just and reasonable rests on the statement in the Commission's report (Appellant's Juris. Stmt. p. 34) that there is a "strong similarity" between the suburban territory served by the Milwaukee Road and that served by the North Western, and hence that the schedule of North Western fares, summarized in the Commission's report (Appellant's Juris. Stmt. p. 29) should be used as a basis in fixing fares for the Milwaukee Road.

In Appellant's Jurisdictional Statement (p. 12) it is suggested that there is other evidence to show that the fares prescribed are just and reasonable, although the report and order of the Interstate Commerce Commission make clear that the sole test of the reasonableness of the fares fixed was in fact the present rates of fare of the North Western.

There is no evidence to support any finding or conclusion that the Milwaukee Road's suburban operation is similar to that of the North Western and that the same rates of fare should be prescribed as those fixed for the North Western. As set forth in the opinion of the District Court (Appellant's Juris. Stmt. pp. 22-3) the evidence shows, in fact, that the operations are wholly dissimilar; and hence

that there is no justification for fixing the Milwaukee Road's fares on the North Western basis.

There is no reasonable ground upon which further argument should be required on this factual question in this Court.

C.

The District Court Correctly Held That the State Commission Had Primary Jurisdiction Over the Intrastate Fares and That Before the Interstate Commerce Commission Can Nullify Fares Fixed by the State Authority, Justification for the Exercise of Federal Power Must Clearly Appear; and in Further Holding That There Was No Justification for Exercise of That Authority in This Case.

The fact that the state authority has primary jurisdiction over intrastate rates has been clearly recognized by the decisions of this Court.

North Carolina v. *United States*, 325 U. S. 507 (511).

Illinois Central Railroad Co. v. *Public Utilities Commission*, 245 U. S. 493 (510).

As said in the *North Carolina* case, above cited (325 U. S. 507, 511):

> "Since the enactment of Section 13(4), as before its enactment, a state's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section.
>
> * * * * *
>
> A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet 'a high stand-

ard of certainty.' * * * Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appear.'"

In the instant case, of the $306,000 annual out-of-pocket deficit found by the Interstate Commerce Commission to exist, approximately $260,000 represented depreciation of locomotives and equipment, and maintenance of right-of-way used by both through and suburban trains.

In the proceeding before the Illinois Commission, which preceded the application to the Interstate Commerce Commission, the Milwaukee Road, of its own volition, excluded from out-of-pocket expense, the depreciation and maintenance-of-way items referred to.

In view of the savings upon dieselation of the Milwaukee Road's suburban service, the Illinois Commission found (and correctly, as shown by the evidence in the case before it) that there was practically no cash deficit in suburban passenger operations and that the rates as fixed in 1951 should not be increased.

In the proceeding before the Interstate Commerce Commission, the Milwaukee Road included the depreciation and maintenance-of-way items as out-of-pocket expense and thus presented a different case. This fact is commented on in the report of the Interstate Commerce Commission (Appellant's Juris. Stmt. p. 32).

Under the circumstances, the decision of the Illinois Commission was not unfair and could not be held to be an unjust and unreasonable discrimination against interstate commerce. The state could not be deprived of its primary jurisdiction where it had no opportunity to pass on the case on the evidence as presented to the federal commission.

To permit the order of the Interstate Commerce Commission to stand in this case, even if it had been supported by adequate evidence, would be to deprive state commis-

sions of all power over state rates. A carrier could obtain an imposition of discriminatory state rates by sham proceedings and then seek exercise of federal power.

Cases permitting federal action while state commission orders are on appeal in state courts, *Illinois* v. *United States*, 101 Fed. Supp. 36, aff'd 342 U. S. 939; *North Carolina* v. *United States*, 128 F. Supp. 718, aff'd 350 U. S. 805—or cases where one state challenges the rates of another, *Florida* v. *United States*, 282 U. S. 194—are not authority to the contrary.

The decision of the District Court on this point (see Opinion, pp. 7, 8, *ante*) is in accordance with the principles of law as laid down by this Court.

We submit that the motion to affirm the judgment of the District Court should be granted.

Respectfully submitted,

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